

for 458 and 459.

United States Court

FEB 26 1900

Drp. (reply) of Southmayd & Rowe
Supreme Court of the United States.
for Bondholders (l)

OCTOBER TERM, 1899.

No. 458.

Filed Feb. 26, 1900.

GEORGE T. MURDOCK, AS EXECUTOR, &C., OF JANE H. SHERMAN,
DECEASED,

Plaintiff in Error,

vs.

JOHN G. WARD, AS UNITED STATES COLLECTOR OF INTERNAL REVENUE,
Defendant in Error.

No. 459.

GEORGE D. SHERMAN,

Plaintiff in Error,

vs.

THE UNITED STATES,

Defendant in Error.

BRIEF IN REPLY ON BEHALF OF UNITED STATES BONDHOLDERS,
FILED BY LEAVE OF COURT IN ANSWER TO TECHNICAL OBJECTION
TO THE SUFFICIENCY OF THE RECORD, RAISED FOR THE FIRST
TIME BY THE SOLICITOR-GENERAL IN HIS REPLY TO THE BRIEF
OF EVARTS, CHOATE & BEAMAN.

EVARTS, CHOATE & BEAMAN,

*Attorneys for CHARLES F. SOUTHMAYD and
other Holders of Bonds.*

CHS. F. SOUTHMAYD,

In Person.

WILLIAM V. ROWE,

Of Counsel



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

GEORGE T. MURDOCK, as Executor, &c.,
of Jane H. Sherman, deceased,
Plaintiff-in-Error,

vs.

JOHN G. WARD, as United States Col-
lector of Internal Revenue,
Defendant-in-Error.

No. 458.

GEORGE D. SHERMAN,
Plaintiff-in-Error,

vs.

THE UNITED STATES,
Defendant-in-Error.

No. 459.

BRIEF IN REPLY

*On behalf of United States bondholders, filed by
leave of Court in answer to technical objec-
tion to the sufficiency of the record, raised for
the first time by the Solicitor-General in his
reply to the brief of Evarts, Choate & Beaman.*

In his brief in reply to that of Evarts, Choate & Beaman, the Solicitor-General *for the first time, at this final stage* of the cause, raises a technical objection to the sufficiency of the records in Nos. 458 and

459, to present the question, so elaborately argued, as to the validity of the Federal Succession Tax when imposed in respect to the "passing" of United States bonds.

Throughout all the argument heretofore it has been assumed that there was no possible objection to these records, and it is somewhat suggestive that we should find an objection of this technical nature raised at the final stage of the argument.

The learned Solicitor-General says (page 5 of brief in reply to Evarts, Choate & Beaman):

"Pages of elaborate discussion are submitted by counsel upon the question whether the United States bonds which pass either by will or by intestate laws from a testator or intestate to his legatee or distributee are subject to this tax or duty, and yet no case presenting an instance of such passage or transmission is before the Court. Cases Nos. 458 and 459 present the same facts * * * in neither case is it averred that any specific tax was made of any United States bonds owned by the testatrix at the time of her death. The only averment with respect to such bonds is that about one-third of the estate was invested in them at the time of her death."

And again he says:

"The only averment is that the testatrix died possessed of an estate of which one-third consisted of United States bonds. There is no allegation that these bonds have passed by the will to the legatees or any of them. For aught that appears in the record the executor and trustee may have sold every bond, may have distributed a portion of the proceeds in money among the legatees and have invested the balance under the residuary clause in taxable securities."

Brief in Reply, &c., pp. 5 and 6.

The learned Solicitor-General is not only mistaken in his facts, but (on p. 5, near the foot of the

page) he make the fatal admission that these are cases—

“where a *personal estate* of a certain value in money has passed to the executors to be charged against them as money,” &c.

The War Revenue Act of June 13, 1898, distinctly imposes this tax upon those very persons to whom the Solicitor-General declares that this estate has passed, and to whom, as we shall show, it has in fact passed, that is to say, upon the executors and trustees.

Section 29 of the act provides that

“Any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property * * * passing after the passage of this act from any person possessed of such property * * * shall be and hereby are made subject to a duty or tax to be paid to the United States.”

In other words, it is *the executors and trustees* in this case, who have in charge the property and who are “made subject to a duty or tax to be paid to the United States.” They and they alone are the persons taxed in respect to property “passing to them.” The property passed to them at death, and the tax then attached and was paid by them. The schedule or return, made by the Collector and annexed to the petitions and complaint in each case, shows that it was *the whole estate* “passing” to the executors, referred to in the petition and complaint, upon which the tax was laid.

The learned Solicitor-General is mistaken in his assertion that the facts in the two cases are identical.

In the *Murdock Case*, No. 458 (record, pp. 6 and 7), it appeared that, under the will of Jane H. Sherman, deceased, there passed to the plaintiff as executor and trustee under her will a very large

personal estate, upon the passing of which to the plaintiff the Collector of Internal Revenue had exacted a tax of \$36,827.53, this tax being levied (p. 7) on account of the legacies or distributive shares "arising from personal property" being "*in charge or trust*" of this plaintiff as such executor as aforesaid, the properties assumed to be assessed for such tax being properties passing from the said Jane H. Sherman (see also return and schedule to Collector annexed to complaint). It then appears on page 8 that—

"A very large proportion, and at least *one-third of the personal estate upon account of which said tax was exacted from and paid by this plaintiff, consisted in the bonds and interest-bearing evidences of debt issued by the Government of the United States, and which by contract between the United States and the holders thereof were and are not subject or liable to assessment or taxation, nor was or is this plaintiff subject or liable to assessment or taxation by means of his ownership or holding as executor as aforesaid or otherwise of such bonds and certificates of indebtedness.*"

It would be difficult to conceive of a case more explicitly presenting the precise questions argued than does this record in No. 458. The law provides that the tax shall be levied upon the *executor*, in respect to the estate "*passing*" from the testator, and which at the time of the levying of the tax is found *in the possession of the executor*. It is the "*passing*" of the property which is taxed, and it is the *executor or trustee*, in whose possession it is found after the death of the testator, upon whom the tax is assessed, and who is called upon to pay it, and in fact did pay it here. These United States bonds so passed, and the tax was laid upon them, as appears from this record, *in the hands of this executor*.

In the *Sherman Case*, No. 459, which related to the passing of the same estate and the tax thereon

in the hands of the same executor, it appeared (Record, p. 2) that the estate amounted to \$1,235,571 —

“a considerable portion of which, to wit, at least one third thereof, consisted of what are commonly called Government bonds -- that is to say bonds issued by the Government of the United States under the authority of acts of Congress—and certificates of indebtedness of the Government of the United States issued under the provisions of acts of Congress, bearing interest, and which bonds or certificates of indebtedness this petitioner is advised and believes and charges the fact to be are not subject to assessment or taxation by the United States or by any State, and there is by virtue of the acts of Congress directing the issuing of such bonds and certificates of indebtedness a contract between the Government of the United States and the holders of such bonds and certificates of indebtedness that the same are non-taxable and non-assessable for the purposes of taxation.”

It then further appears that the tax was laid upon Murdock, as the executor of the will of Jane H. Sherman, deceased, in respect to the passing of said property, including said bonds (see the Schedule or Return made to the collector, and annexed to the complaint), and that he thereupon paid the total tax of \$36,827.53, of which sum \$8,969.02 was paid by, and—

“taken and deducted by said executor from the income due and payable to your petitioner [plaintiff in error] under and by virtue of the provisions of said will, from the share of said estate, including Government bonds, set apart by virtue of the provisions of said will, as the share of said estate from which the income is payable to your petitioner during his life, and if the said payment was lawfully required to be made by said executor, he, the said executor, was authorized by said act to pay the same from the funds of said estate, and in fact he did pay the same from the income of said estate pay-

able to your petitioner and deducted the same therefrom."

Record, pp. 2 and 3.

It further appears, by the twenty-fourth clause of the will of the testatrix (Record, p. 8, in No. 459), that there was devised to Murdock, as executor and trustee, one-third of the residuary estate in trust for the benefit of George D. Sherman, the plaintiff in error, for his life, and *it is this one-third, of which, it appears, these Government bonds constituted a part, which has been "set apart by virtue of the provisions of said will as the share of said estate from which the income is payable to your petitioner during his life," and from which share it appears that the executor "in fact did pay" the portion of the tax attributable to the passing of such share* (Record, p. 3).

The petitioner in the *Sherman Case* thereupon alleged that the tax was unconstitutional, unlawful and void, "and in so far as said tax has been imposed upon or collected from said executor *by reason of his ownership as executor of the interest in the estate of said deceased which consists of the Government Bonds above mentioned, the defendant has not right or authority to impose or assess any tax whatever upon the same*" (Record, p. 4).

In the *Murdock Case*, No. 458, the plaintiff charged that by reason of the premises, to which we have above referred in our quotations from the record in that case, "*the amount of said tax has been unlawfully exacted from him as executor of said estate*" (Record in No. 458, p. 8).

It is extremely difficult to conceive of a case, the record in which should have more clearly and explicitly presented this question than do the records in the cases at bar. The War Revenue Act imposes the tax upon *the executor and trustee* in respect to the "passing" of property which is found in his

charge and possession. The records in these cases show the fact to be that *the bonds in question were in the possession and charge of the executor, constituting a part of the property "passing" under the will of Jane H. Sherman, deceased.* It further appears that *a part of those bonds was actually set apart to and constituted a part of the residuary estate held in trust by this same executor for the benefit of George D. Sherman, the plaintiff in error in No. 459, and that the proportion of the tax, paid in respect to that part of the estate, was "in fact" deducted from the income of said trust belonging to said Sherman.*

We, therefore, respectfully submit that these records are, not only amply sufficient to present the question heretofore argued in these cases, but are in point of fact absolutely free from any defect which can be made the basis of any objection, no matter how technical.

EVARTS, CHOATE & BEAMAN,
Attorneys for CHARLES F. SOUTH-
MAYD and other holders of
bonds.

CHS. F. SOUTHMAYD,
In Person.

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Of Counsel.

*The record—(See petition, complaint & assignment of errors)
"Arises in question" the constitutionality of the War Revenue
Act, and, as a consequence, "this Court requires jurisdic-
tion of the entire case and of all questions involved in."
Horne v. U.S. 143 U.S. 570, 576-7.*